

TWG 6/8/99

ATTACHMENT

12A -

NEW 36 CFR 800 REGULATIONS AND POSSIBLE REASONS TO TERMINATE EXISTING PROGRAMMATIC AGREEMENT AND SUBSTITUTE NEW REGULATIONS

(Note, the following is taken mostly from the Council's "The Revised Section 106 Regulations: Major Changes")

1. Better definition of participants' roles. The lead Federal agency's primary responsibility for making Section 106 decisions is emphasized. Advisory roles of Council, SHPO and new Tribal Historic Preservation Officers (THPO) and consulting parties are clarified.
2. Native American roles defined and strengthened. On tribal lands, THPOs make decisions regarding significance of historic properties, effects, and treatment of those effects, including signing Memoranda of Agreement. Off tribal lands, the Federal agencies consult with tribes attaching religious and cultural significance to properties.
3. Public participation clarified. The public must be given the opportunity to express their views on ways to resolve adverse effects. Agencies may use their established public involvement procedures [possibly use the TWG, AMWG for part of public participation?]
4. Use of NEPA. Agencies may substitute EIS or EA and public participation and documentation process for NEPA for Section 106.
5. Phasing of adverse effect determinations. Under the new 800.5(a)(3), the Federal agency may phase adverse effect determinations, especially in linear projects.
6. Recommended Memorandum of Agreement (new 800.6(b)) and Guidance on Data Recovery from Archeological Sites. If consulting parties agree on treatment, then a MOA is signed, bringing the Section 106 process to closure.

Reclamation is bringing in a consultant to review the status of compliance, the long-term monitoring program as it relates to compliance, and to make recommendations about terminating the existing PA and substituting a treatment plan with attached MOA under the new regulations. Since the regulations define the roles better than the current regulations, and since the new regulations are written to accomodate the multiple and often conflicting values of cultural properties, it might be worthwhile to adopt the new regulations as we move toward the year 2000.

Status on Existing Programmatic Agreement for Cultural Resource Compliance and Recommendations to Terminate and Adopt New 36 CFR 800 Regulations

The 1994 PA included five major stipulations in italics below. Questions or issues with these stipulations follow.

1. *Define Undertaking and Area of Potential Effect.* APE is the area where an undertaking has the potential to cause changes in eligible historic properties. For operation of Glen Canyon Dam, the length of the APE was the dam to Lake Mead; the width was that covered by a 256,000 cfs flow.

Question: What are the areas of direct, indirect and cumulative effect of dam operation? How do these differ from areas impacted by dam existence which is not part of the undertaking?

2. *Identify and evaluate historic properties within the APE.* A total of 475 sites were recorded. Of these, 338 are located within the 256,000 cfs level. Most of these sites are considered eligible to the National Register for their information value (National Register Criterion D). In addition, Hopi, Navajo, Hualapai tribes identified sites of cultural and religious values (Criteria A and B). (Paiute and Zuni did not identify sites but stated the whole canyon was of value.)

3. *Monitoring and remedial action.* Long-term monitoring was stipulated to identify changes to properties caused by dam operations. Mitigating actions were identified as bank stabilization and installation of check dams to slow erosion or gully formation, or archeological data recovery to retrieve important information about the past.

Question: if the AMP defines the APE with direct, indirect, and cumulative impact areas, is there any reason to continue to document dam effects through monitoring?

4. *Write Historic Preservation Plan.*

Question: A draft was prepared, but there is not widespread agreement about the purpose, scope and utility of the HPP. Is this still necessary, especially if the new regulations are adopted in place of the existing PA?

5. *Hold yearly meeting on PA.* Consultation meetings have been held approximately four times a year since 1994.